

## LEGAL MEMO

**TO: DON ALLEN, WESTERN ENVIRONMENTAL TRADE  
ASSOCIATION**  
**FROM: MICHAEL S. KAKUK, ATTORNEY**  
**RE: HB 0432 BILL MEMO**  
**DATE: FEBRUARY 5, 2007**

### PURPOSE AND DISCLAIMER

You have asked me to prepare a brief summary of some of the legal implications associated with HB0432. This is provided below.

### PLEASE NOTE:

1. This memo is based on preliminary research and additional research may need to be completed based on testimony in Committee and other relevant information received.
2. I do not attempt to review any of the numerous science-related issues associated with this bill.

### BILL No.: HB0432

BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT LIABILITY FOR DAMAGES RESULTING FROM THE INTRODUCTION OF A GENETICALLY MODIFIED ORGANISM MUST BE ASSUMED BY THE COMPANY THAT HOLDS THE PATENT FOR THE GENETICALLY MODIFIED ORGANISM; AND PROVIDING AN EXEMPTION FROM LIABILITY FOR THE COMPANY THAT HOLDS THE PATENT TO A GENETICALLY MODIFIED ORGANISM WHEN A FARMER KNOWINGLY AND INTENTIONALLY GROWS A GENETICALLY MODIFIED ORGANISM."

WHEREAS, genetic engineering artificially transfers genes at the cellular and molecular level between species that could never naturally breed and is therefore qualitatively different from traditional selective breeding; and

WHEREAS, many of the potential effects of genetically modified organisms are unpredictable, long-term, or irreversible; and

WHEREAS, the biotechnology companies that invent and manufacture genetically modified organisms are scientific experts with regard to this technology; and

WHEREAS, the burden of ensuring that farmers and grain warehouse operators are not harmed by this technology should be placed on the company that holds the patent to the genetically modified organism; and

WHEREAS, a genetically modified organism is substantially equivalent to an organism that is not genetically modified in its ability through cross-pollination to transfer its genetic traits, whether they are genetically engineered or not, to other organisms that are not genetically modified; and

WHEREAS, in current agronomic science, agricultural practices, and agricultural infrastructure, genetically modified organisms cannot be successfully segregated from organisms that are not genetically engineered; and

WHEREAS, the introduction of genetically modified organisms may cause significant harm to domestic and foreign market acceptance and may cause loss of value of Montana's crops, which impacts Montana farmers and Montana's crop-handling and crop-processing industries.

***MSK Comments: I question many of these assertions but will not comment on this section unless specifically requested to do so.***

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

**NEW SECTION. Section 1. Definitions.** As used in [sections 1 and 2], the following definitions apply:

(1) "Crop contamination" means any transfer of genetic material from a genetically engineered crop, by cross-pollination or other means, to a nongenetically engineered crop.

***MSK Comments: Note how "contamination" equals "transfer".***

(2) "Farmer" means a person responsible for planting a crop, managing a crop, or harvesting a crop.

(3) "Genetically modified organism" means an organism:

(a) that is altered at the molecular or cellular level by means that are not possible under natural conditions or processes, including but not limited to:

- (i) recombinant DNA and RNA techniques;
- (ii) cell fusion;

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(3) "Genetically modified organism" means an organism:

(a) that is altered at the molecular or cellular level by means that are not possible under natural conditions or processes, including but not limited to:

(i) recombinant DNA and RNA techniques;

(ii) cell fusion;

(iii) microencapsulation;  
(iv) macroencapsulation;  
(v) gene deletion and doubling;  
(vi) introduction of a foreign gene; and  
(vii) a change in the positions of genes, other than by a means consisting exclusively of breeding, conjugation, fermentation, hybridization, in vitro fertilization, or tissue culture;

(b) that is created through sexual or asexual reproduction, or both, involving a genetically modified organism and that has been altered as described in subsection (3)(a) if the organism possesses any of the altered molecular or cellular characteristics of the other genetically modified organism described.

(4) "Grain warehouse operator" means a person who owns, operates, or controls a grain warehouse or terminal warehouse.

***MSK Comments: My discussions with agricultural interests indicate that this definition may unintentionally include commodity dealers as well. Additional research on this issue is necessary.***

(5) "Person" means an individual, a partnership, a firm, an association, a municipality, a public or private corporation, the state, a subdivision of the state, a trust, an estate, or any other legal entity.

(6) "Strict liability" means absolute liability for any damages that result from the use of genetically modified organisms without respect to intention or negligence.

***MSK Comments: The potential impact of these definitions are discussed below.***

**NEW SECTION. Section 2. Liability for damages resulting from introduction of genetically modified organism -- exemption.** (1) Except as provided in subsection (3), the company that holds the patent for a genetically modified organism is subject to strict liability for damages caused to farmers or grain warehouse operators by the use of the genetically modified organism. Damages include but are not limited to:

***MSK Comments:***

- ***This section states that the "company" that holds the patent is strictly liable, however, "company" is not defined. Often, patent holders are individuals, universities, or even units of government, with no control over, or interest in, the use of the genetically modified organism (GMO) in Montana. I question as to whether or***

*not this is provision is constitutional, see below, and it certainly raises important public policy issues;*

- Traditionally, strict liability has been used for inherently dangerous acts, e.g., explosives manufacturing, or defective products. Bill proponents' arguments notwithstanding, there is nothing inherently dangerous or defective about the use of GMO's. It is important to note that GMO's are already subject to federally reviewed approval processes. Additionally, making GMO's subject to strict liability would be unique under Montana law. A quick search of Montana code reveals that "strict liability" is currently only imposed under Title 31, Chapter 1, regarding safekeeping of certificates of title. I'll continue to research the issue of the imposition of strict liability under Montana law;*
- I question whether or not this section is constitutional on a number of grounds, the first being that it may be a violation of the Commerce Clause of the U.S. Constitution. In the absence of health and safety data establishing legitimate grounds to impose such a drastic liability scheme for GMO patent holders, the only justification for this statute is to unfairly protect certain economic interests. In my opinion, this protectionism violates the Commerce Clause. This bill clearly attempts to unconstitutionally burden interstate commerce as patent holders affected by this law are likely not Montana companies;*
- Also, this bill allows certain classes of agricultural business to recover for damages from a patent holder, who may not have controlled sales, production, or promotion, of the GMO in Montana, far beyond the well-established legal norms of causation and liability. This extension, even in the name of alleged consumer protection and truth in labeling laws, also likely violates, in my opinion, the Due Process Clause of the U.S. Constitution; and*
- Lastly, I question whether this bill infringes on the Federal Plant Protection Act, and as such, could violate the federal government's preemption of state regulatory action over GMO's. Additional research on this issue is necessary.*

*(a) loss, due to crop contamination, of any price premium that would have accrued to a farmer or grain warehouse operator for nongenetically modified products by contract or other marketing arrangement or that would have been otherwise reasonably available to the farmer or grain warehouse operator through ordinary commercial channels;*

(b) any additional transportation, storage, handling, or related charges or costs incurred by the farmer or grain warehouse operator that would not have been incurred in the absence of crop contamination;

(c) any judgment, charge, or penalty for which the farmer or grain warehouse operator is liable because of breach of contract, including loss of organic certification, for failure to deliver a crop or shipment free of genetically modified organisms or for delivering a crop or shipment exceeding any contractually agreed tolerances for the presence of genetically modified organisms; and

(d) market price reductions incurred by farmers resulting from the loss of exports caused by major importing countries refusing to accept a genetically engineered crop variety.

**MSK Comments:**

- ***“Major importing countries” is not defined; and***
- ***This section attempts to hold individual companies liable for the unpredictable whims of the global commodity market, which can be affected by numerous factors. This bill holds a patent holder liable for the entirely speculative effects of the patent holder’s actions on a world-wide marketplace and could stagnate future agricultural innovations.***

(2) A farmer or grain warehouse operator may bring action in the appropriate court against any person that causes harm under this section. The prevailing plaintiff in an action under this subsection may recover reasonable attorney fees and other litigation expenses as part of the costs, including those related to appeals.

**MSK Comments:** *This section allows an action against a “person”, although under Section 2(1), it is only the “company” that is liable. I do not understand, nor can I tell from the text, the intent of this legal distinction between “person” and “company”.*

(3) A farmer who knowingly and intentionally plants a crop that contains a genetically modified organism may not make a claim for damages that resulted from contamination against the company that holds the patent for the genetically modified organism.

**NEW SECTION. Section 3. Codification instruction.** [Sections 1 and 2] are intended to be codified as an integral part of Title 80, chapter 5, and the provisions of Title 80, chapter 5, apply to [sections 1 and 2].